

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

Level 3 Communications, LLC, a Delaware limited liability company

Plaintiff,

vs.

Rates Technology, Inc., a Delaware corporation

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Level 3 Communications, LLC (“Level 3”) alleges its Complaint against
Defendant Rates Technology, Inc. (“Rates”) as follows:

Parties

1. Level 3 is a limited liability company organized and existing under the laws of the
State of Delaware with a place of business at 1025 Eldorado Blvd., Broomfield, CO 80021.

2. Rates is a corporation organized and existing under the laws of the State of
Delaware with its principal place of business at 50 Route 111, Suite 210, Smithtown, NY 11787.

Gerald J. Weinberger represents himself to be the President of Rates.

JURISDICTION AND VENUE

3. This civil action regarding allegations of patent infringement and invalidity arises under Title 35 of the United States Code (35 U.S.C. §§ 1 et seq.), the Declaratory Judgment Act (28 U.S.C. §§2201 and 2202) and the antitrust laws of Title 15 of the United States Code (15 U.S.C. §1 et seq.).

4. This Court has jurisdiction over the subject matter of this Complaint pursuant to 28 U.S.C. §§ 1331, 1337, 1338(a), 1367, 2201 and 2202.

5. An actual, justifiable controversy exists between the parties with respect to infringement, validity, and enforceability of U.S. Patent Nos. 5,425,085 (“the ‘085 patent”) and 5,519,769 (“the ‘769 patent”) (collectively “the Patents”). Copies of the Patents are attached as Exhibits A and B, respectively. Specifically, Rates contends that Voice-over-Internet Protocol (VoIP) services and systems infringe the Patents. Level 3 makes, uses, sells and/or offers to sell VoIP services and systems in the United States and contends that it has the right to make, use, sell and/or offer to sell such VoIP services and systems in the United States without a license from Rates for any of the Patents. The acts of Rates indicate its intent to enforce the Patents against Level 3 and have created a reasonable apprehension in Level 3 that it will face a patent infringement suit by Rates relating to Level 3’s VoIP services and systems.

6. Venue is proper in this district under 28 U.S.C. § 1391.

7. Rates conducts continuous and substantial business in Colorado. Rates has intentionally engaged in contacts with Colorado involving the Patents. On information and belief, these Colorado contacts include negotiating and entering into and receiving compensation for license agreements, settlement agreements, and agreements involving a license or covenant

not to sue under the Patents—including with, for example, Qwest Communications, TW Telecom, and Level 3. Further, Rates has initiated at least one infringement action in this District, therefore voluntarily availing itself to jurisdiction in this District. *See Rates Tech. Inc. v. Tele-Matic Corp.*, Case No. 1:95-cv-01635-ABJ (D. Col. June 28, 1995).

BACKGROUND

8. Rates contends to be the lawful owner of the Patents and contends to have the right to sue and to recover for any and all infringements of the Patents at all relevant times.

9. The ‘085 patent issued on June 13, 1995 and is entitled “Least Cost Routing Device for Separate Connection into Phone Line.” The ‘769 patent originally issued on May 21, 1996 and is entitled “Method and System for Updating a Call Rating Database.” Subsequently, a reexamination certificate issued on May 28, 2002.

10. Claims 1-13 of the ‘085 patent recite numerous limitations governed under 35 U.S.C. § 112, paragraph 6, including without limitation:

- a. first jack means for connection to said first telephone and second jack means for connection to said network;
- b. switch means operatively connected to said first jack means for disconnecting said first telephone from said network during routing of a telephone call from said first telephone;
- c. means operatively connected to said switch means for generating a current through said switch means to the first telephone corresponding to a current provided by said network, when the first telephone is disconnected from said network by said switch means;

- d. database means for storing billing rate parameters for determining a least cost communication path for call corresponding to said telephone number;
- e. means operatively connected to said switch means for detecting and storing said telephone number originating from the first telephone;
- f. means for addressing said database means for identifying a plurality of communication switch paths to said second telephone and the cost rate of each path;
- g. means actuated subsequent to the detection of said telephone number originating from said first telephone for comparing the cost rate of each path so as to determine a least cost route; and
- h. means operatively connected to said switch means and said second jack means for generating a number sequence corresponding to a desired carrier so that said call is routed through said second jack means to the selected communication path and carrier to establish a switched connection between said first telephone and said second telephone phone.

11. Claims 14-23 of the '085 patent recite numerous limitations governed under 35 U.S.C. § 112, paragraph 6, including, without limitation, those limitations set forth below:

- a. first jack means for connection to said first telephone, and second jack means for connection to said network, means positioned on said housing for visibly displaying the time and date;

- b. switch means operatively connected to said first jack means for disconnecting said first telephone from said network during routing of a telephone call from said first telephone;
- c. means operatively connected to said first jack means for disconnecting said first telephone from said network;
- d. means operatively connected to said switch means for generating a current through said switch means to said first telephone corresponding to said current provided by said network, when the first telephone is disconnected from the network by the switch means;
- e. means operatively connected to said time and date display means and said switch means for receiving a predetermined dial sequence from said first telephone corresponding to a predetermined date and time to be displayed and means for changing the displayed time and date based on the received signals;
- f. database means for storing billing rate parameters for determining a least cost communication path for a call corresponding to said telephone number, based on such factors as the time and date of the call;
- g. means operatively connected to said switch means for detecting and storing said telephone number originating from the first telephone;
- h. means for addressing said database means for identifying a plurality of communication switch paths to said second telephone and the cost rate of each path; and

- i. means actuated subsequent to the detection of said telephone number originating from the first telephone for comparing the cost rate of each path so as to determine a least cost route, and means operatively connected to said switch means and said second jack means for generating a number sequence corresponding to a desired carrier so that said call is routed through said second jack means to the selected communication path and carrier to establish a switched connection between said first telephone and said second telephone.

12. On or about July 21, 2010, Mr. Weinberger sent Level 3 Communications, Inc. (“Level 3 Inc.”), an indirect affiliate of Level 3, a letter accusing Level 3 Inc. of infringing the Patents by making, using, selling, offering for sale and importing VoIP services and systems. In his letter, Mr. Weinberger threatened to file a patent infringement action against Level 3 Inc. unless Level 3 Inc. paid a large sum of money to Rates.

13. On or about January 7, 2011, Mr. Weinberger sent Level 3 Inc. another letter threatening litigation against Level 3 Inc. The January 7, 2011 letter included a claim chart regarding Rates’ infringement allegations relating to the ‘085 patent. The January 7, 2011 letter did not include a claim chart relating to the ‘769 patent.

14. On or about March 15, 2011, Mr. Weinberger and Level 3’s Vice President of Intellectual Property held a phone call to discuss, amongst other things, the January 7, 2011 letter including the claim chart. Level 3’s V.P. of Intellectual Property made it clear that Level 3 did not infringe any of the Patents and that a license under the Patents would not provide any value to Level 3. In response, Mr. Weinberger stated that, with payment of the license fees, “you are buying the right not to be sued, that is what you are buying.” Mr. Weinberger refused to

substantively discuss the merits of the claim chart. Mr. Weinberger also stated Level 3's decision to litigate or license the Patents would not be a legal decision, but rather a business decision given that the current state of patent litigation was analogous to a "blackjack bet" and that the case "will cost 4, 5, 6 million dollars."

15. On May 13, 2011, Mr. Weinberger attempted to follow through on his threats and filed a lawsuit against Level 3 Inc. in the United States District Court for the Southern District of New York. *See Rates Tech. Inc. v. Level 3 Communications, Inc.* No. 1:11-cv-03254 (S.D.N.Y. May 13, 2011) ("the New York action"). In the New York action, Rates alleges that Level 3 Inc. has willfully infringed the Patents within the United States, including without limitation through the building, maintenance and operation of telecommunications equipment which Rates alleges infringes the Patents and the marketing, offering for sale and sale of Internet telecommunications services provided on equipment which Rates alleges infringes the Patents. A copy of Rates' complaint against Level 3 Inc. in the New York action is attached as Exhibit C.

16. On May 13, 2011, Level 3 sent Rates a letter advising Rates that Level 3 doesn't infringe either Patent and notifying Rates that its infringement claims are improperly based on the telecommunications industry as a whole as opposed to specific application to any Level 3 system or service. In this letter, Level 3 notified Rates that its infringement claims were without merit and that the pursuit of any litigation by Rates in connection with the Patents would reflect a wholly inadequate pre-suit investigation.

17. In the New York action, Rates is seeking damages from Level 3 Inc. in an amount not less than \$540,000,000.

18. Rates has not served Level 3 Inc. with the complaint, even though the case has been on file for more than 45 days. Nevertheless, since filing the New York action, Rates has continued its baseless assertions that Level 3 Inc. infringes the Patents and has threatened numerous times to serve Level 3 Inc. with the complaint, and has therefore continued pursuit of a baseless and meritless claim.

19. Upon information and belief, and within the past five years, Rates has sued many other entities for patent infringement of at least one of the Patents based upon the manufacture, use and sale of VoIP services and systems in the United States, including without limitation, the following lawsuits:

- a. *Rates Inc. v. MetroPCS Commc'ns, Inc.*, No. 1:2011-cv-03255 (S.D.N.Y. 2011).
- b. *Rates Inc. v. Cox Commc'ns, Inc.*, No. 1:2011-cv-01324 (S.D.N.Y. 2011).
- c. *Rates Inc. v. Mediacom Commc'ns Corp.*, No. 1:2010-cv-09449 (S.D.N.Y. 2010).
- d. *Rates Inc. v. Megapath Inc.*, No. 1:2010-cv-06396 (S.D.N.Y. 2010).
- e. *Rates Inc. v. j2 Global Commc'ns*, No. 1:2010-cv-04527 (S.D.N.Y. 2010).
- f. *Rates Inc. v. HTC Corp.*, No. 1:2009-cv-10385 (S.D.N.Y. 2009).
- g. *Rates Inc. v. Hawk Commc'ns LLC*, No. 1:2009-cv-10386 (S.D.N.Y. 2009).
- h. *Rates Inc. v. RCN Corp.*, No. 1:2009-cv-04445 (S.D.N.Y. 2009).
- i. *Rates Inc. v. Viper Int'l LLC*, No. 1:2009-cv-04068 (S.D.N.Y. 2009).
- j. *Rates Inc. v. Paetec Holding Corp.*, No. 1:2009-cv-01594 (S.D.N.Y. 2009).
- k. *Rates Inc. v. Callcentric, Inc.*, No. 1:2008-cv-10731 (S.D.N.Y. 2008).

- l. *Rates Inc. v. Arbinet-Thexchange, Inc.*, No. 1:2008-cv-08213 (S.D.N.Y. 2008).
- m. *Rates Inc. v. Sipmedia Enters. LLC*, No. 1:2008-cv-08050 (S.D.N.Y. 2008).
- n. *Rates Inc. v. Cordia Corp.*, No. 1:2008-cv-05782 (S.D.N.Y. 2008).
- o. *Rates Inc. v. Netgear, Inc.*, No. 1:2008-cv-05783 (S.D.N.Y. 2008).
- p. *Rates Inc. v. Voip Your Life, LLC*, No. 1:2008-cv-05510 (S.D.N.Y. 2008).
- q. *Rates Inc. v. VOIP.com*, No. 1:2008-cv-05477 (S.D.N.Y. 2008).
- r. *Rates Inc. v. Fonality, Inc.*, No. 2:2008-cv-00853 (E.D.N.Y. 2008).
- s. *Rates Inc. v. HostRocket.com, Inc.*, No. 2:2008-cv-00644 (E.D.N.Y. 2008).
- t. *Rates Inc. v. Qwest Commc's Co.*, No. 1:2007-cv-00442(D. Del. 2007).
- u. *Rates Inc. v. Primus Telecomms. Inc.*, No. 1:2007-cv-00441 (D. Del. 2007).
- v. *Rates Inc. v. Time Warner Telecom Inc.*, No. 2:2006-cv-05243 (E.D.N.Y. 2006).
- w. *Rates Inc. v. Net2phone, Inc.*, No. 2:2006-cv-03604 (E.D.N.Y. 2006).

20. Level 3 Inc. does not use VoIP systems or provide VoIP services to its customers, and Level 3 Inc. is not registered to do business in New York.

21. At this time, Level 3 has not been named a party to the New York action. As between Rates and Level 3, Level 3 is the first to file a civil action in any district court.

22. Level 3 uses VoIP systems in the operation of its business and sells and offers to sell services to its customers that use VoIP technology (“Level 3’s VoIP Business”).

23. Level 3 is a direct subsidiary of Level 3 Financing, Inc., which is a direct subsidiary of Level 3 Inc.

24. In view of the New York action and Rates' various threats, Rates contends that Level 3 has infringed the Patents within the United States, including without limitation through the building, maintenance and operation of telecommunications equipment as well as the marketing, offering for sale and sale of Internet telecommunications services provided on equipment. .

25. Level 3 denies Rates' contentions and also contends that any relevant claims of the Patents are invalid and/or unenforceable. An actual controversy exists at least as to whether Level 3 infringes either of the Patents. Absent a declaration of noninfringement, invalidity and/or unenforceability, Rates will continue to wrongfully assert the Patents against Level 3, causing Level 3 irreparable harm.

COUNT I

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. 5,425,085

26. The allegations of the preceding paragraphs 1-24 are repeated and incorporated by reference.

27. Based on the New York action, Rates' continuous threats to litigate the Patents against Level 3 Inc. and Rates' prior litigation of the Patents against many other companies, Level 3 has a reasonable apprehension that Rates will file a lawsuit against Level 3 alleging infringement of the '085 patent.

28. Level 3 has not infringed, is not now infringing, will not infringe, either directly, contributorily, or by inducement, any claim of the '085 patent.

29. Accordingly, a valid and justiciable controversy has arisen and exists between Level 3 and Rates with respect to the '085 patent, and Level 3 seeks declaration that the '085 patent is not infringed, contributorily infringed, or infringed through inducement by Level 3.

COUNT II

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. 5,519,769

30. The allegations of the preceding paragraphs 1-24 are repeated and incorporated by reference.

31. Based on the New York action, Rates' continuous threats to litigate the Patents against Level 3 Inc. and Rates' prior litigation of the Patents against many other companies, Level 3 has a reasonable apprehension that Rates will file a lawsuit against Level 3 alleging infringement of the '769 patent.

32. Level 3 has not infringed, is not now infringing, will not infringe, either directly, contributorily, or by inducement, any claim of the '769 patent.

33. Accordingly, a valid and justiciable controversy has arisen and exists between Level 3 and Rates with respect to the '769 patent, and Level 3 seeks declaration that the '769 patent is not infringed, contributorily infringed, or infringed through inducement by Level 3.

COUNT III

DECLARATION OF UNENFORCEABILITY

34. The allegations of the preceding paragraphs 1-24 are repeated, and incorporated herein by reference.

35. Upon information and belief, the Patents are unenforceable because of inequitable conduct by the applicants, their attorneys, and/or agents during the prosecution and

reexamination of the Patents before the U.S. Patent and Trademark Office (“PTO”). The inequitable conduct includes Rates’ and/or Mr. Weinberger’s or his agent’s failure to disclose material information to the PTO and misrepresentations concerning the prior art, made with an intent to mislead or deceive the patent examiner, as set forth below.

36. Upon information and belief, Rates failed to cite a prior art technology called “Alpha-LCR.” Rates has previously been accused of failing to disclose Alpha-LCR to the PTO in a prior litigation that occurred in this District. *See Open LCR.com v. Rates Technology, Inc.*, 112 F. Supp. 2d 1223 (D. Col. 2000) (the “Open LCR litigation”).

37. Upon information and belief, as early as 1987, one of Open LCR’s founders had participated in the invention of a technology, called “Alpha-LCR,” for routing calls from a telephone device to selected low-cost carriers. *Id.* at 1225.

38. Upon information and belief, in 1994, Mr. Weinberger filed applications for each of the Patents. On information and belief, at least Mr. Weinberger was aware of Alpha-LCR at this time. Mr. Weinberger did not disclose Alpha-LCR to the PTO.

39. Upon information and belief, sworn declarations filed in the Open LCR litigation state that in or about March 1999, Mr. Weinberger contacted Open LCR in an attempt to enforce the Patents against that company and that Open LCR told Mr. Weinberger that one of its co-founders had invented Alpha-LCR in Japan.

40. Upon information and belief, on August 31, 1999, a third party requested that the PTO reexamine the Patents based on prior art material to patentability. The PTO granted each request, and the reexamination commenced.

41. On information and belief, on or about February 2, 2000, while the reexamination proceedings were pending, Sharp Corporation (later a co-defendant in the Open LCR litigation) sent Rates and Mr. Weinberger user manuals documenting Alpha-LCR as prior art.

42. Upon information and belief, on or about February 8, 2000, Open LCR sent Rates and Mr. Weinberger user manuals from Sharp, Sanyo, Panasonic, Kenwood, and Japanese telecommunications firm DDI, documenting Alpha-LCR as prior art.

43. Upon information and belief, at no time before, during, or after the reexamination proceedings for the Patents did Rates, Mr. Weinberger or any of the other person acting on behalf of Rates disclose Alpha-LCR to the PTO—despite that technology’s materiality to the patentability of the Patents.

44. Upon information and belief, during reexamination proceedings for the ‘769 patent, Rates failed to disclose to the PTO material facts from a declaratory judgment action filed by Mediacom Corporation against Rates on March 10, 1997. *See Mediacom Commc’ns Corp. v. Rates Tech., Inc.*, 1:97-cv-10559 (D. Ma. 1997) (the “Mediacom litigation”).

45. Upon information and belief, during the reexamination proceedings for the ‘769 patent, Rates contended that the patent’s claims were not invalid in view of the “Callmiser prior art.” Upon information and belief, on page 3 of paper #6 in the re-examination proceedings for the ‘769 patent, received by the PTO on January 4, 2000, Rates argued that “[t]he rate information in these [Callmiser prior art] systems was apparently updated monthly, via mail. Hence, these routers were not updated by connecting to the rate provider.” Upon information and belief, almost one year earlier, Rates had received information that the Callmiser prior art systems in fact could be updated by “connecting to the rate provider.”

46. Upon information and belief, on or about February 19, 1999, Mediacom had moved for summary judgment of invalidity and noninfringement of the '769 patent. Upon information and belief, in connection with its motion, Mediacom filed and served sworn declarations (including the Declarations of John M. Lull and Michael T. Finnin) and accompanying evidence (collectively the "Mediacom Declarations") showing that the Callmiser prior art in fact was capable of being updated by modem. Because the Mediacom Declarations bore directly on the scope of the Callmiser prior art, the Mediacom Declarations were material to the reexamination proceedings for the '769 patent.

47. Upon information and belief, Rates was obligated by their duty of candor to the PTO to disclose the Mediacom Declarations to the PTO in the reexamination and Rates failed to do so. Upon information and belief, Rates made their arguments about the Callmiser prior art to avoid a determination by the PTO that the '769 patent's claims were invalid and Rates failed to disclose the Mediacom Declarations received almost one year earlier because they contradicted Rates' arguments about the Callmiser prior art. Upon information and belief, Rates therefore withheld disclosure of the Mediacom Declarations so that they could deceive the PTO examiner responsible for the reexamination.

48. Upon information and belief, during reexamination proceedings for the Patents, Rates failed to inform the PTO about Rates' claim construction arguments—and the court's orders related thereto—in the Mediacom litigation. *See MediaCom Corp. v. Rates Tech.*, 4 F. Supp.2d 17 (D.Mass. 1998); *MediaCom Corp. v. Rates Tech.*, 34 F. Supp.2d 76 (D. Mass. 1998).

49. Upon information and belief, Rates wrongfully failed to disclose to the PTO, during initial prosecution of the applications that led to the Patents (and during later

reexaminations of the Patents themselves), prior art cited in two European search reports dated July 19, 1995 and August 2, 1995 (the “European Prior Art”). Upon information and belief, the European Patent Office (“EPO”) issued the search reports during the prosecution of two European patent applications that claimed priority to the same applications that led to the issuance of the Patents. Upon information and belief, the European search report compiled the prior art deemed by the EPO examiner to be material, or at least potentially material to the patentability of the counterpart patent applications, and the European Prior Art included, among other references WO-A-92 11725, GB-A-2 128 451, and GB-A-2 218 595.

50. Upon information and belief, from their personal involvement in prosecution of the applications that led to the Patents, Rates had personal knowledge that the European Prior Art had not been disclosed to or cited by the PTO during initial prosecution of the Patents, yet Rates did not disclose the European Prior Art, despite the fact that Rates knew or should have known that the PTO examiner during initial prosecution—and later during reexamination—would have considered that prior art material to the issue of patentability.

51. Upon information and belief, Rates’ omissions and/or misleading statements alleged above were, as a matter of law, material to the patentability of the Patents.

52. Upon information and belief, the omissions and/or misleading statements were made with the intent to mislead or deceive the PTO.

53. Accordingly, a valid and justiciable controversy has arisen and exists between Level 3 and Rates with respect to the enforceability of both Patents and Level 3 hereby seeks declaration that the Patents are not enforceable under the doctrine of inequitable conduct.

COUNT IV

MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

54. The allegations of the preceding paragraphs 1-24 and 33-52 are repeated, and incorporated by reference.

55. Rates' infringement accusations of the Patents by Level 3 Inc. and the filing of the New York Action was and are objectively baseless. No reasonable litigant could realistically expect success on the merits, because the Patents are clearly not infringed by Level 3 Inc. and are unenforceable.

56. Rates' infringement accusations of the Patents by Level 3 Inc. and the filing of the New York Action was and is motivated by a subjective intent to abuse the litigation process to interfere with Level 3 Inc.'s business, rather than obtain judicial relief. For example, Rates improperly and illegally threatened and initiated the New York action against Level 3 Inc. for the purpose of extorting a settlement payment from Level 3 Inc. based solely on litigation cost avoidance.

57. Rates' initiation of the New York action constitutes sham litigation and strips Rates of any immunity to the United States Antitrust laws.

58. In the January 7, 2011 phone call, Mr. Weinberger stated that "the '085 patent is the invention of switched VoIP" and that the '085 patent covers all VoIP equipment and services that operate in accordance with industry standard protocols ("the Relevant Market"). As construed by Rates, the claims of the Patents are so broad that any manufacturer or provider of VoIP systems and services in the United States requires a license under the Patents, or risks

being sued by Rates for patent infringement. Accordingly, as construed by Rates, the Patents dominate the Relevant Market.

59. Rates has asserted the Patents against Level 3 Inc. and many other companies operating in the Relevant Market. Upon information and belief, Rates has engaged in a pattern of repeatedly threatening and initiating frivolous litigations against Level 3 Inc. and other companies operating in the Relevant Market for the purpose of extorting settlement and license fees based solely on litigation cost avoidance, with the specific intent of acquiring monopoly power within the Relevant Market, and has demanded billions of dollars in licensing fees from these companies, Level 3 Inc. included.

60. Upon information and belief, Rates has successfully used the threat of litigation and its associated costs to enter patent license, covenant not to sue and/or settlement agreements with dozens of companies that do not infringe the Patents.

61. Upon information and belief, Rates ignores the scope of the claims of the Patents while accusing companies, like Level 3 Inc., of infringing the Patents in an attempt to establish a significant barrier to entry of or continuing business in the Relevant Market and thus has improperly exhibited market power in the Relevant Market. Through its pattern of threatening and initiating costly and frivolous patent infringement litigations without regard to claim scope of the Patents in the Relevant Market, Rates has been continuously engaged in anticompetitive and predatory conduct designed to illegally maintain and/or extend its market power in the Relevant Market.

62. Through its illegal anticompetitive conduct, Rates has monopolized and/or attempted to monopolize the Relevant Market, in violation of 15 U.S.C. §2.

63. Rates illegal anticompetitive conduct has caused and will continue to cause injury to Level 3 in the form of, for example, lost profits, damage to the reputation of Level 3's business, attorneys' fees and other costs associated with frivolous litigation.

64. Accordingly, a valid and justiciable controversy has arisen and exists between Level 3 and Rates with respect to Rates' anticompetitive practices and Level 3 hereby seeks declaration that such anticompetitive practices are in violation of 15 U.S.C. §2.

COUNT V

DECLARATION OF INVALIDITY OF U.S. PATENT NO. 5,425,085

65. The allegations of the preceding paragraphs 1-24 are repeated and incorporated by reference.

66. Based on Rates' construction of the terms of the '085 patent, the relevant claims of the '085 patent are invalid for failure to comply with one or more of the statutory requirements of patentability of Title 35 of the United States Code including without limitation, 35 U.S.C. §§ 102, 103 and/or 112.

67. Accordingly, a valid and justiciable controversy has arisen and exists between Level 3 and Rates with respect to the validity of the '085 patent and Level 3 hereby seeks declaration that the '085 patent, as construed by Rates, is invalid.

COUNT VI

DECLARATION OF INVALIDITY OF U.S. PATENT NO. 5,519,769

68. The allegations of the preceding paragraphs 1-24 are repeated and incorporated by reference.

69. Based on Rates' construction of the terms of the '769 patent, the relevant claims of the '769 patent are invalid for failure to comply with one or more of the statutory requirements of patentability of Title 35 of the United States Code including without limitation, 35 U.S.C. §§ 102, 103 and/or 112.

70. Accordingly, a valid and justiciable controversy has arisen and exists between Level 3 and Rates with respect to the validity of the '769 patent and Level 3 hereby seeks declaration that the '769 patent, as construed by Rates, is invalid.

REQUESTED RELIEF

Level 3 requests that the Court enter a final judgment that:

1. U.S. Patent No. 5,425,085 is not infringed, contributorily infringed, or infringed through inducement by Level 3;
2. U.S. Patent No. 5,519,769 is not infringed, contributorily infringed, or infringed through inducement by Level 3;
3. enjoins and restrains Rates from enforcing or making any claim that Level 3 infringes U.S. Patent No. 5,425,085 in any way;
4. enjoins and restrains Rates from enforcing or making any claim that Level 3 infringes U.S. Patent No. 5,519,769 in any way;
5. U.S. Patent No. 5,425,085 is unenforceable;
6. U.S. Patent No. 5,519,769 is unenforceable;
7. the claims of U.S. Patent No. 5,519,769 are invalid;
8. the claims of U.S. Patent No. 5,425,085 are invalid;

9. awards Level 3 its costs, expenses and attorney's fees, in accordance with 35 U.S.C. § 285;

10. Rates violated 15 U.S.C. §2 and that awards damages and/or restitution to Level 3 sufficient to compensate Level 3 for Rates' violation of 15 U.S.C. §2, in an amount to be proven at trial, including trebled damages, attorneys' fees and prejudgment interest; and

11. such other and further relief as this Court may deem just and equitable.

Date: July 14, 2011

Respectfully submitted,

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